Costs

We now turn to the question of costs. In this case, the Law Society had framed the charges in an extremely broad manner, and in respect of the first charge and the seventh alternative charge they are outside the scope of the information referred by the Attorney General. In respect of most of the charges we found the evidence most inadequate. For these reasons and taking into account all other relevant circumstances, we are of the opinion that in this case the respondent should have his costs of the hearing before us. We accordingly so ordered.

Order accordingly.

Solicitors: *Donaldson & Burkinshaw; Chor Pee & Co.*

Reported by *Yap Shao Sin*

MALAYSIAN REPORTS

Government of Malaysia & Anor v Taib bin Abdul Rahman

SUPREME COURT (KUALA LUMPUR) — CIVIL APPEAL NO 01-59 OF 1990
ABDUL HAMID LP, MOHAMED AZMI AND GUNN CHIT TUAN SCJJ
6 APRIL 1991

Civil Procedure — Consent order — Action for damages for personal injuries sustained in road accident — Death of plaintiff — No personal representative appointed — Application of son of plaintiff to be made a party — Consent order made — Application to set aside consent order — Subordinate Courts Rules 1980, O 8 r 9(1) — Probate and Administration Act 1949, s 39

Civil Procedure — Parties — Capable or proper person — Action for damages for personal injuries sustained in road accident — Death of plaintiff — No personal representative appointed — Application of son of plaintiff to be made a party — Letters of administration not granted to son

Words and Phrases — 'That other person' — Subordinate Court Rules 1980, O 8 r 7(2) & r 9(1)

In this case one Taib bin Ibrahim had brought an action for damages against the appellants arising out of a road accident. In the course of the proceedings in the sessions court the plaintiff died and his son, Abdul Rahim, applied to be appointed a party under O 8 r 7(2) of the Subordinate Courts Rules 1980. The application was allowed by the learned president with the consent of both parties so that the action could be carried on as if Abdul Rahim had been substituted as a plaintiff for his deceased father. Subsequently, however, the appellants applied to have the consent order set aside on the ground that Abdul Rahim was not a capable nor proper person to be made a party to the suit as letters of administration had not been granted to him. The learned judge of the High Court dismissed the application and the appellant appealed.

Held, dismissing the appeal:

(1) In order to give effect to the principal object of r 7(2) of O 8 of the Subordinate Courts Rules 1980, which is to avoid delay in the dispute of cases, the word 'that' immediately preceding the word 'other person' should be read merely as a relative or conjunctive adverb. It should not be read as a demonstrative pronoun referring to the earlier mentioned 'some other person' upon whom the interest or liability of a party devolves but should be read as a mere conjunction introducing the words 'other person'.

(2) When at any stage of any proceedings, the plaintiff dies intestate and his interests devolve or vest temporarily in the official assignee under s 39 of the Probate and Administration Act 1959, until administration or probate is granted, the court has the discretion to order that his son or some other person be made a party under O 8 r 7(2), if the court thinks it necessary in order to ensure that all matters in dispute in the cause or matter may be completely determined and adjudicated upon.

(3) In this case having waived the defence of limitation through the consent order, the consent order can only be set aside by a fresh action.

[Bahasa Malaysia summary

Di dalam kes ini seorang bernama Taib bin Ibrahim telah membawa tindakan untuk mendapat gantirugi dari perayu oleh kerana kecederaan dari kemalangan jalan raya. Di dalam masa kes itu dibicarakan di mahkamah sesyen perayu telah meninggal dunia dan anaknya Abdul Rahim telah memohon dilantikkan menjadi pihak di dalam kes itu dibawah A 8 k 7(2) Kaedah-Kaedah Mahkamah Rendah 1980. Permohonan itu telah dibenarkan oleh yang dipertua mahkamah sesyen dengan persetujuan semua pihak supaya tindakan itu boleh diteruskan sebagai Abdul Rahim menggantikan tempat plaintif bagi pihak ayahnya yang telah meninggal. Akan tetapi kemudiannya perayu telah memohon supaya perintah persetujuan itu diketepikan atas alasan Abdul Rahim tidak seorang yang layak atau wajar dijadikan pihak di dalam kes itu oleh kerana surat mentadbir belum diberi kepadanya. Hakim yang arif Mahkamah Tinggi telah menolak permohonan itu dan perayu telah membuat rayuan.

Diputuskan, menolak rayuan itu:

(1) Supaya kesan diberi kepada tujuan utama A 8 k 7(2) Kaedah-Kaedah Mahmamah Rendah 1980, iaitu untuk mengelakkan kelambatan penyelesaian kes-kes, perkataan 'itu' selepas perkataan 'orang lain' hendaklah dibaca hanya sebagai kata sifat pertalian atau perhubungan. Ia tidak harus dibaca sebagai gantinama petunjuk yang merujuk kepada perkataan yang disebut terdahulu iaitu 'seseorang lain' kepada siapa kepentingan atau tanggungan sesuatu pihak dipikul akan tetapi hendaklah dibaca seperti perangkai memperkenalkan perkataan 'orang lain'.

(2) Apabila di mana-mana peringkat mana-mana prosiding, plaintif telah meninggal dunia tanpa membuat wasiat dan kepentingannya turun atau terletak hak sementara kepada pegawai pemegang serahhak (official assignee) dibawah s 39 Akta Probet dan Pentadbiran 1959, sehingga probet atau surat kuasa mentadbir diberi, mahkamah mempunyai budicara memerintahkan anak orang itu atau seorang lain dijadikan pihak dalam kes itu di bawah A 8 k 7(2), Kaedah-Kaedah Mahkamah Rendah, jika mahkamah berpendapat adalah perlu untuk menentu semua perkara yang dipertikaikan di dalam kuasa atau perkara itu ditentukan sepenuhnya dan diputuskan

(3) Di dalam kes ini apabila pembelaan had masa telah dilepaskan melalui perintah persetujuan, perintah persetujuan itu hanya boleh diketepikan melalui tindakan yang baharu.]

Cases referred to

1 *Tio Chee Hing* v *Tractors Malaysia* [1973] 1 MLJ 66 (FC); [1975] 2 MLJ 1 (PC) (refd)

Legislation referred to

Limitation Act 1953 s 6
Probate and Administration Act 1959 s 39
Public Authorities Protection Act 1948 s 2(a)
Subordinate Courts Rules 1980 O 8 rr 7(2), 9(1)

Appeal from: Civil Appeal No 11-9-86 (High Court, Kuantan)

Mary Lim (Senior Federal Counsel) for the appellants.
Dato' Mahindar Singh for the respondent.

Cur Adv Vult

Mohamed Azmi SCJ (delivering the judgment of the court): This was an appeal against the order of Lamin J dated 6 August 1990, in upholding the decision of the then president of the sessions court, Kuantan, whereby he had dismissed the appellants' application to set aside a consent order under O 8 r 7(2) of the Subordinate Courts Rules 1980.

The respondent, Taib bin Abdul Rahman, was the plaintiff in Civil Suit No 118 of 1981 in the sessions court. He claimed to have been knocked down on 11 September 1978 whilst lawfully walking along the road in Kuantan by a motor cycle owned by the Federal Government (first appellant) and ridden by Mustafa bin Abdul Aziz (the second appellant), who was a postman in the employment of the Postal Department. As such, he claimed damages for personal injuries sustained as a result of the negligence of the postman, both against the Federal Government as owner of the motor cycle and the motor cyclist.

It was common ground that in the course of the proceedings, the plaintiff died on 3 July 1984 and his son, Abdul Rahim bin Taib, applied by notice of application dated 22 January 1985 to be appointed a party to the proceedings under O 8 r 7(2) which provision was cited in full by the learned president in his judgment, the relevant part of which will be reproduced later. When the application came up for hearing, it would appear from the notes of proceedings of the sessions court that the appellants who at all material times were represented by counsel, were satisfied firstly that the applicant had the necessary capacity to apply under O 8 r 7(2) and secondly that the application was necessary in order to ensure that all matters in dispute in the 1978 personal injury claim might be effectually and completely determined and adjudicated upon even though Abdul Rahim, the applicant, had yet to be appointed as a personal representative of his father's estate under the Probate and Administration Act 1959 (Rev 1972). Consequently, on 12 April 1985, the application of Abdul Rahim to be made a party was allowed by the learned president with the consent of both parties so that the proceedings could be carried on as if Abdul Rahim had been substituted as plaintiff for his deceased father. However, about three and a half months later, the appellants apparently had second thoughts on the propriety of the consent order, and on 5 August 1985 they applied to have the consent order set aside on the ground that Abdul Rahim was 'neither a capable nor proper person to be made a party to this suit..., in that neither letters of administration nor probate have been granted to the said applicant so as to confer capacity within the meaning of O 8 r 7(2)....'

We cannot help but observe that what must be paramount in the mind of the appellants can be discovered in para 4 of the affidavit-in-support of their application to set aside dated 30 July 1985 to the effect that 'the claim of the applicant on his own behalf is barred by virtue of both s 2(a) of the Public Authorities Protec-

tion Act 1948 (Rev 1978) and s 6 of the Limitation Act 1953 (Rev 1981), the protection of which has clearly been waived by the appellants by the consent order. Having waived the defence of limitation through the consent order, we are of the view that this is the type of consent order which can only be set aside by fresh action — see *Tio Chee Hing* v *Tractors Malaysia Bhd.*[1] If this legal point had been canvassed before the appellate judge, it would probably expedite the conclusion of the present dispute in favour of the respondent.

Be that as it may, the learned president, Encik Tee Ah Seng, gave a reasoned judgment for making the order that he did. In the absence of a written judgment by Lamin J, we must assume that he agreed entirely with the reasons advanced for dismissing the appellants' application to set aside the consent order. We now reproduce the relevant part of the grounds of decision of the learned president:

> The issue is whether the said order of 12 April 1985 was correct. Order 8 r 7(2) reads as follows:
>
> 'Where at any stage of the proceedings in any cause or matter the interest or liability of any party is assigned or transmitted to or devolves upon *some other person*, the Court may, if it thinks it necessary in order to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon, order *that other person* to be made a party to the cause or matter and the proceedings to be carried on as if he had been substituted for the first mentioned party'. (Emphasis supplied.)
>
> In this rule the words 'devolves upon some other person' are used. According to *Stroud's Judicial Dictionary* (4th Ed), 'To 'devolve' means to pass from a person dying to a person living, the etymology of the word shows its meaning' (per Leach MR, *Parr* v *Parr* 2 LJ Ch 167). In our case on the death of the plaintiff the interest of the deceased in the suit devolves upon the applicant.
>
> I am of the the opinion that the use of the word 'person' shows that persons other than the personal representative can be appointed by the court to continue a pending suit. If it is the intention of the legislature that only personal representatives can be appointed the draftsman would have used the words 'personal representative' to avoid any ambiguity. The meaning of the word 'person' becomes clearer when read with r 9(1) of the Rules. Rule 9(1) reads as follows:
>
> 'If after the death of a plaintiff or defendant in any action the cause of action survives, but no order under r 7 is made substituting as plaintiff any person in whom the cause of action vests or, as the case may be, the personal representatives of the deceased defendant, the defendant or, as the case may be, those representatives may apply to the Court for an order that unless the action is proceeded with within such time as may be specified in the order the action shall be struck out as against the plaintiff or defendant, as the case may be, who has died; but where it is the plaintiff who has died, the Court shall not make an order under this rule unless satisfied that due notice of the application has been given to the personal representatives (if any) of the deceased plaintiff and to any other interested persons who, in the opinion of the Court, shall be notified.'
>
> In r 9(1) the words 'but no order under rule 7 is made substituting as plaintiff *any person* in whom the cause of action vests' are used. And the use of the words 'any person' emphasized by me rather than the words 'personal representative' as used in respect of a deceased defendant clearly shows that there is a distinction between the meaning of the words 'person' and 'personal representative'. The meaning of the word 'person' in this r 9(1) means any person.
>
> Further the later part of r 9(1) provides that, '...due notice of the application has been given to the personal representatives (if any) of the deceased plaintiff and to any other interested persons...' This also supports my opinion that the word 'person' in r 7 means a person who is not a personal representative can be appointed for the purpose of r 7.
>
> I am of the view that O 8 r 7(2) does not refer to personal representatives but refers to a person. I am of the opinion that this rule is not concerned with the capacity of a person. It merely gives the court power to appoint any person to proceed with a pending suit when a party dies rather than leave the matter hanging until letters of administration or probate is granted.
>
> I disagree with appellants' contention that because s 39 of the Probate and Administration Act which provides that all property of a person dies intestate until administration is granted vests in the Official Administrator and as such the Official Administrator is the proper and capable person to apply.

We are equally in agreement with the reasons discussed by the learned president. We need only to add that although under s 39 of the Probate and Administration Act 1959, the interests of the deceased plaintiff vest in the Official Administrator (since he died intestate), it does not mean that pending an order for a grant of administration, only the Official Administrator could make an application to be made a party under O 8 r 7(2). In our opinion, such an interpretation would defeat the very object of r 7(2) which is to avoid delay in the disposal of cases where the interests or liabilities of any party to a pending proceeding vest temporarily upon some other person, such as the Official Administrator. In our view the narrow interpretation advocated by learned counsel for the appellants has its root in the misinterpretation of the word 'other person' in the latter part of r 7(2) as referring to the words 'some other person' in the earlier part of the provision.

In our opinion, in order to give effect to the principal object of the rule, which is to avoid delay in the disposal of cases, the word "that' immediately preceeding the word "other person' should be read merely as a relative or conjunctive adverb. In short, when the property or interest of an estate devolves or vests by virtue of s 39 in some other persons — in this case the Official Administrator, 'the Court may order that other person (ie person other than the Official Administrator) to be made a party to the cause or matter'. It seems clear that the word 'that' should not be read as a demonstrative pronoun referring to the earlier mentioned 'some other

person' upon whom the interest or liability of a party devolves or vests but should be read as mere conjunction introducing the words 'other person'.

Thus, it is our conclusion that, when at any stage of any proceedings, the plaintiff dies intestate, and his interests devolve or vest temporarily in the Official Assignee under s 39, until administration or probate is granted, the court has the discretion to order that his son or any other person be made a party under O 8 r 7(2), if the court 'thinks it necessary in order to ensure that all matters in dispute in the cause or matter may be completely determined and adjudicated upon'.

On the disputed facts of the present appeal, the High Court was clearly correct in upholding the order of the sessions court. We had accordingly dismissed the appeal but made no order as to costs.

Appeal dismissed.

Solicitors: *Mahindar & Co.*

Reported by *Prof Ahmad Ibrahim*

Pendaftar Hakmilik Negeri Kedah v Oversea-Chinese Banking Corp Ltd

SUPREME COURT (KUALA LUMPUR) — CIVIL APPEAL NO 01-39 OF 1990
MOHAMED AZMI, GUNN CHIT TUAN AND JEMURI SERJAN SCJJ
30 MARCH 1991

Land Law — Registrar's caveat — Registrar's caveat entered to secure that land will be able to satisfy debt due to Federation — Land previously charged under four charges to the respondent bank — Order for sale of land obtained by respondent — Whether registrar had wrongly exercised his discretion to enter caveat — National Land Code 1965, ss 320, 340 & 418

In this case the owner of a piece of land in Alor Star, Kedah, had in all executed four separate charges from 1917 to 1982 in favour of the respondent. In 1986 the Registrar of Titles, Kedah (the appellant), received a letter from the Department of Inland Revenue, Kedah, requesting him to enter a registrar's caveat under s 320 of the National Land Code 1965 in respect of the property on the grounds that the registered proprietor was owing income tax to the department. The registrar's caveat was entered against the said property and notice of it was given to the registered proprietor. Subsequently in 1988 the respondent obtained an order for the sale of the property. The respondent then received a letter from the appellant confirming the entry of the registrar's caveat. The respondent filed a notice of motion to appeal under s 418 of the National Land Code 1965 against the appellant's decision to enter the said caveat. The learned judge of the High Court held that when the appellant entered the registrar's caveat, he had failed to take into consideration the fact that there were registered charges on the said land as well as other relevant matters and therefore the decision to enter the registrar's caveat was ultra vires his powers under s 320(1)(ba) of the National Land Code 1965. See [1990] 2 MLJ 478. The appellant appealed.

Held, dismissing the appeal:
The appellant in this case had not exercised his discretionary powers according to and within the limits set out in the provisions of s 320(1)(ba) of the National Land Code 1965 because he had failed to take relevant considerations into account. As he had not acted judiciously or reasonably within the ambit and scope of that section, he had therefore exceeded his powers under the section and has therefore acted ultra vires and his act was therefore invalid. The learned judge was therefore correct in ordering the said registrar's caveat to be cancelled under s 418 of the National Land Code 1965.

[Bahasa Malaysia summary

Di dalam kes ini tuanpunya sekeping tanah di Alor Star, Kedah, telah menggadai tanah dengan empat gadaian dari 1971 hingga 1982 kepada responden. Pada tahun 1986 Pendaftar Hakmilik Kedah (perayu) telah menerima surat dari Jabatan Hasil Dalam Negeri, Kedah, memintanya memasukkan kaveat pendaftar di bawah s 320 Kanun Tanah Negara 1965 terhadap tanah itu oleh kerana tuanpunya tanah belum menjelaskan cukai pendapatan kepada Jabatan itu. Kaveat pendaftar itu telah dimasukkan terhadap tanah itu dan notisnya telah diberi kepada tuanpunya tanah itu. Kemudiannya pada tahun 1988 responden telah mendapat perintah untuk penjualan tanah itu. Responden telah diberi surat dari perayu mengesahkan kemasukan kaveat pendaftar itu. Responden telah memfailkan notis rayuan di bawah s 418 Kanun Tanah Negara 1965 terhadap keputusan perayu memasukkan kaveat itu. Yang arif hakim Mahkamah Tinggi memutuskan bahawa apabila perayu memasukkan kaveat pendaftar itu, ia telah tidak mengambilkira nyataan bahawa terdapat beberapa gadaian didaftar terhadap tanah itu dan juga lain-lain perkara dan oleh kerana itu keputusan memasukkan kaveat pendaftar itu adalah ultra vires kuasanya di bawah s 320(1)(ba) Kanun Tanah Negara 1965. Perayu telah membuat rayuan.

Diputuskan, menolak rayuan itu:
Perayu di dalam kes ini telah tidak menjalankan kuasa budibicaranya mengikut dan di dalam batas yang dikenakan oleh peruntukan s 320(1)(ba) Kanun Tanah Negara 1965 oleh kerana ia telah tidak mengambilkira perkara-perkara yang berkaitan. Oleh kerana ia telah tidak menjalankan kuasanya dengan bijaksana dan munasabah di dalam lingkungan dan skop seksyen itu, ia telah melampaui kuasanya di bawah seksyen itu dan telah bertindak secara ultra vires dan tindakannya itu adalah tak sah. Hakim yang arif oleh kerana itu telah betul memerintahkan kaveat pendaftar itu dibatalkan di bawah s 418 Kanun Tanah Negara 1965.

Legislation referred to
National Land Code 1965 ss 320(1)(ba), 321, 418, 431

Appeal from: Originating Motion No 25-37-89 (High Court, Alor Setar)

Dato' Haji Abdul Malek bin Haji Ishak (Legal Adviser, Kedah) for the appellant.
Porres P Royan (Mary S Nitchingham with him) for the respondent.

Cur Adv Vult

Gunn Chit Tuan SCJ (delivering the judgment of the court): This appeal was the result of the entry of a registrar's caveat under the provisions of s 320(1)(ba) of the National Land Code 1965. The facts of the case